

JUST COMPENSATION AND THE ASSASSIN'S BEQUEST: A UTILITARIAN APPROACH

On November 22, 1963, President Kennedy was killed by an assassin's bullet. Close on the heels of the tragedy, hucksters began their profiteering on the nation's grief. They held little sacred, not even items directly involved in the assassination itself. Mr. John J. King, who purchased the rifle from which the fatal bullet was fired and the pistol used in the murder of Officer Tippitt, declared to the Senate in 1965 that his prizes were "the Mona Lisa" and "La Pieta" of the firearms world and indicated his intention to make millions of dollars displaying the weapons all over the world.¹

Popular disgust at the exploitation of objects so closely connected with President Kennedy's death challenged public institutions to respond. In August 1973, the National Archives purchased the equipment in the emergency room of the Dallas hospital in which the President was pronounced dead. The purchase was made expressly to prevent the equipment's commercial exploitation. "'No one,'" declared a spokesman for the National Archives, "'realistically would want this material to wind up in a private collection and be displayed . . . in a tasteless way.'"²

In *Porter v. United States*,³ the Court of Appeals for the Fifth Circuit was faced with deciding whether the broadly shared distaste which prompted the action of the National Archives should find expression in law. The court's choice was framed by the following events. Pursuant to Public Law 89-318,⁴ which

¹ 111 CONG. REC. 27,262 (1965).

² Philadelphia Inquirer, Aug. 18, 1973, at 3, col. 5.

³ 473 F.2d 1329 (5th Cir. 1973), *rev'g* 335 F. Supp. 498 (N.D. Tex. 1971).

⁴ Act of November 2, 1965, 79 Stat. 1185. In relevant part, the statute provides:

[I]t is hereby declared that the national interest requires that the United States acquire all right, title, and interest, in and to, certain items of evidence, to be designated by the Attorney General pursuant to section 2 of this Act, which were considered by the President's Commission on the Assassination of President Kennedy (hereinafter referred to as 'items'), and requires that those items be preserved by the United States.

Sec. 2. (a) The Attorney General is authorized to determine, from time to time, which items should, in conformity with the declaration contained in the first section on this Act, be acquired and preserved by the United States. Each such determination shall be published in the Federal Register.

(b) Whenever the Attorney General determines that an item should be acquired and preserved by the United States, all right, title, and interest in and to, that item shall be vested in the United States upon publication of that determination in the Federal Register.

Sec. 3. The United States Court of Claims or the United States district court for the judicial district wherein the claimant resides shall have jurisdiction, without regard to the amount in controversy, to hear, determine, and render

authorized the United States to acquire important items of evidence considered by the Warren Commission, the Government took title⁵ to Lee Harvey Oswald's personal papers, photographs and the contents of his wallet, property which had been owned by Oswald's widow, Marina Oswald Porter. The statute provided that the government justly compensate those from whom property was taken, and Mrs. Porter brought suit in the United States District Court for the Northern District of Texas seeking a determination of the compensation due her.

A special master was appointed by the district court to find the market value of the items. He determined that their market value, including their potential commercial worth, was \$17,729.37. The district court, while accepting the special master's findings, made clear its belief that to allow Mrs. Porter to realize such a large profit due solely to her ties with the President's assassin would constitute a grave injustice. It therefore awarded Mrs. Porter \$3,000, the sum that both parties stipulated was the "market value of personal property similar in kind" to the property which was the subject of the suit.⁶ The court of appeals, though not unmoved by this notion of equity, felt constrained by established principles of law to award what it saw to be the clear and unambiguous fair market value of the property and reversed the district court's decision and awarded Mrs. Porter the value found by the special master, \$17,729.37.⁷ The basis of the disagreement between the district court and the court of appeals will become clearer in light of the theory and goals of the law of just compensation.

I. ELEMENTS OF JUST COMPENSATION

A. *Fair Market Value*

The law governing the determination of appropriate compensation in condemnation proceedings is dominated by the concept of fair market value.⁸ In an effort to establish workable

judgment upon any claim for just compensation for any item or interest therein acquired by the United States pursuant to section 2 of this Act

⁵ The property in question had actually been in the possession of the government since November 22, 1963 and used in the investigation of the assassination. 473 F.2d at 1332. Thus, the precise date of the taking of the items, an important fact for valuation purposes, was placed in issue. However, both the District Court and the Court of Appeals determined the date of the taking to be November 1, 1966, 335 F. Supp. at 500, 473 F.2d at 1336, and our discussion will assume this to be the actual date of the taking.

⁶ The government's agreement with this grossly inflated estimate of the value of items like those taken from Mrs. Porter is a most intriguing element of the case, and one not overlooked by the Court of Appeals. 473 F.2d at 1333 n.4. See also text preceding note 50 *infra*.

⁷ 473 F.2d at 1334-5, 1338.

⁸ See 4 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 12.1-12.2 (3d rev. ed. 1971) [hereinafter cited as NICHOLS]. For an interesting critique of the idea of fair market value

rules⁹ effectuating the command of the fifth amendment that compensation in the wake of takings by the government be just "both to [the] owner whose property is taken and to the public that must pay the bill,"¹⁰ courts have adopted the principle that the owner of condemned property is "entitled to be put in as good a position pecuniarily as he would have occupied if his property had not been taken"; at the same time the owner is not to be made better off as a result of the government's action.¹¹ This goal of indemnification¹² dictates that the owner's loss rather than the buyer's gain determine what sum justly compensates.¹³ If there is an ascertainable price that represents what "a purchaser willing but not obligated to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses for which [it] was suited and might in reason be applied,"¹⁴ that sum, the fair market value, is generally assumed to equal the owner's loss and is therefore considered to be determinative of proper compensation.¹⁵

B. Distributional and Other Equity Considerations

The appeal of the indemnification model of just compensation derives from the fact that it approximates the operation of a free and perfectly competitive market, and in so doing, leads to an allocation of resources within society which approaches the ideal of economic efficiency.¹⁶ The pursuit of economic

as a measure of just compensation, see Bigham, "Fair Market Value," "Just Compensation," and *the Constitution: A Critical View*, 24 VAND. L. REV. 63 (1970).

⁹ United States v. Miller, 317 U.S. 369, 375 (1943).

¹⁰ United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

¹¹ Olsen v. United States, 292 U.S. 246, 255 (1934).

¹² The evolution of the indemnification theory of just compensation is traced in Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME LAWYER 765, 770-87 (1973).

¹³ United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 281 (1943).

¹⁴ NICHOLS, *supra* note 8, at § 12.2[1] (footnotes omitted).

¹⁵ *Id.* § 12.2. See also, e.g., United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 402 (1949); United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 275 (1943).

¹⁶ Definitions of economic efficiency appear numerous. Professor Calabresi and Mr. Melamed define efficiency to be "that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before. This is often called Pareto optimality." Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094 (1972). This form of the definition emphasizes the relationship between the perfectly competitive market and the attainment of a state of Pareto optimality or economic efficiency. Given the existence of a perfectly competitive market, if trades could be made which could increase the level of economic welfare felt by one or more members of society without decreasing the level of welfare felt by another member, the presumption is that such trades would continue to be made until no more such exchanges could occur. Professor Michelman's characterization emphasizes the utilitarian basis of the concept: "The concept of efficiency is . . . a concept of ethical maximizing, implying the goodness of increasing some quantity to the limits of possibility [A]n 'efficient' process is one which maximizes the total amount of welfare, of personal satisfaction, in society, and not all satisfaction is material." Michelman, *Property, Utility, and Fairness: Comments on the*

efficiency as the primary goal of compensation policy is not, however, without its ethical problems. First, it relies on the assumption that each individual has the ability to determine for himself which allocation of resources is best from his point of view.¹⁷ A second and perhaps more crucial difficulty with the primacy of efficiency stems from the fact that the specific allocation of resources resulting from market exchange depends critically on the distribution of tradable wealth among individuals before the exchange occurred.¹⁸ A given allocation may be

Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1173 (1967). For an illuminating discussion of the concept of efficiency, its relationship to market processes, and its ethical bases, see W. BAUMOL, *ECONOMIC THEORY AND OPERATIONS ANALYSIS* ch. 13 (1961).

It might be wondered why takings, and the problems of just compensation which follow in their wake, are necessary at all if the competitive market can be counted on to guarantee economically efficient transfers. The simple answer, of course, is that the competitive market cannot always be counted on to do so. In some cases substantial costs of information gathering and negotiation may prevent voluntary (and thus efficient) transfers which would have taken place in the absence of such costs. The power of eminent domain, pursuant to which takings are instituted, represents an attempt to ensure efficient allocation in these cases as well by forcing transfer.

This device may not always be used to society's benefit. By setting the sale price at the fair market value and excluding any value the owner derives from the property in excess of that price, the courts have left open the possibility that some properties may be undervalued by the condemnation process with the result that the condemnee experiences a net reduction in personal welfare not fully compensated by the surplus generated by the public use of his property. This result may be likely, for instance, in cases involving property of sentimental value to the owner, value which is peculiar to him and which is not compensable. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946). On consumer surplus, see *A Survey of Welfare Economics, 1939-1959*, in E. MISHAN, *WELFARE ECONOMICS: TEN INTRODUCTORY ESSAYS* 11, 63-71 (2d ed. 1969).

If, however, the owner of the property derives no value from it beyond the fair market value or, as may well be the case in *Porter*, the fair market price itself defines the value of the property to the owner, condemnation proceedings may result in no inefficiencies at all. Consider the following abstraction of the *Porter* facts: Mrs. Porter (P) owns an item for which a private buyer (B) has offered \$18,000. P would accept B's offer, but the government has condemned the property and compelled her to sell to it rather than to B. Now if the government, in the absence of the eminent domain power, would have paid a sum equal to or in excess of \$18,000 for the property, but instead exercises the power and purchases the property for \$18,000, no inefficiency has resulted. A welfare increase that would have accrued to B is transferred instead to the government; the government may enjoy a consumer surplus in the property, but the final allocation of money and property is an efficient one. Similarly, if the government, absent the condemnation power, would have paid only a sum less than \$18,000, and the court fixes the forced sale price at \$18,000, no inefficiency results if the government is then allowed to back out of the transaction and return the property to P. Inefficient allocations result either when the government, which would have valued the property at less than \$18,000, is forced by the court to buy the property for \$18,000 (in which case we may presume the administrative or legislative weighing of costs and benefits which led to the decision to condemn to be in error); or when the government is able to buy the property for less than B would have paid for it.

¹⁷ Calabresi & Melamed, *supra* note 16, at 113-14, discusses the implications of relaxing this condition.

¹⁸ In purely technical terms, it can be shown that by a suitable definition of prices, an efficient allocation of resources can be derived from any set of individual preferences and initial income shares and, conversely, for any particular set of prices and initial income shares, at least one efficient allocation can be made. *See Arrow, The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation*, in *PUBLIC EXPENDITURES AND POLICY ANALYSIS* 59, 61-64 (R. Haveman & J. Margolis eds. 1970).

unsatisfactory, therefore, not because it is inefficient, but rather because the distribution of resources which preceded the market exchange was, in some sense, unjust. To argue, then, for a particular solution to a compensation problem because it is efficient is to argue implicitly either that the distribution of income or resources at the base of the efficient allocation is just and appropriate, or that distributional or other ethical considerations in the case at hand are outweighed by the desirability of efficient allocation.

The recognition that circumstances may at times require that ethical concerns take precedence over allocative efficiency has tempered the law's commitment to fair market value as a measuring rod for just compensation. "Fairness" and "equity" are the core values of the constitutional requirement of just compensation,¹⁹ and when strict application of the fair market value standard "would result in manifest injustice to owner or public, courts have fashioned and applied other standards."²⁰ Thus, heeding the requirements of substantial justice, the Supreme Court has forsaken the goal of allocative efficiency in refusing to make the government pay an enhanced price created by the exigencies of war²¹ or by the government's own demand.²²

This view of "just compensation"—allocative efficiency tempered by notions of equity and substantial justice—allows us to explain the differing results reached by the two courts in *Porter*. While both courts agreed that the fair market value of the property taken from Mrs. Porter was \$17,729.37 and that allocative efficiency would be best served by awarding her that sum, the two courts disagreed as to whether this case presented considerations of fairness and substantial justice sufficiently powerful to require that less than the full market price be awarded.

The district court was disturbed by the prospect of awarding Mrs. Porter such a large sum. Although the innocence of Mrs. Porter herself was never at issue, the court argued that the very

¹⁹ *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).

²⁰ *Id.* at 123 (footnotes omitted); see *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396 (1949).

²¹ See, e.g., *United States v. Cors*, 337 U.S. 325 (1949) (Government not required to pay market value of a tugboat where such value had been enhanced as a result of the government's urgent wartime needs); *United States v. John J. Felin & Co.*, 334 U.S. 624 (1948) (owners of meat taken by government during the war could recover only the O.P.A. ceiling price despite findings that the replacement cost of the meat exceeded its ceiling price). See also *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950); *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396 (1949).

²² *United States v. Cors*, 337 U.S. 325, 333 (1949); *United States v. Miller*, 317 U.S. 69 (1943) (owner not entitled to compensation for enhanced value where value of property has increased solely due to the Government's commitment to condemn).

enormity of the crime should, in fairness, preclude the realization of profit by one so close to the murderer:

The circumstances of this case require that the elements of fair market value of the property involved here resulting from the association of the property with the assassination of the President must be excluded from the measure of just compensation. The nation and its people should not be required to pay a bounty for items of evidence upon which the Warren Commission based its report.²³

Furthermore, the district court also suggested that efficiency considerations also required denial of Mrs. Porter's claim for the fair market value of the property. To pay the enhanced value, the court argued,

would create in a depraved mind contemplating the destruction of the life of one of this nation's high officials an additional incentive for the assassination because the crime assuredly would result in the enrichment of the assassin's spouse or other beneficiary resulting from the enhanced value of his possessions.²⁴

The court of appeals, while aware that the principle that one should not be permitted to profit by his illegal act is based on sound policy considerations,²⁵ refused to attach the stigma of Oswald's guilt to his widow. The court argued that

[w]ere it not for the taking, the owner, Oswald's widow, would have been able to realize a premium for Oswald's

²³ 335 F. Supp. at 500.

²⁴ *Id.*

²⁵ The court dealt with five cases cited by the government in support of the proposition that full compensation was not required in this situation. The court found that *United States v. Cors*, 337 U.S. 325 (1949) and *United States v. Miller*, 317 U.S. 369 (1943), were clearly inapposite since they established only the proposition that the government cannot in fairness be forced to pay an element of value due solely to the government's need for the property in question. The court was more uneasy in dealing with three cases which stand for the notion that justice demands that one who has committed a crime should not be permitted to profit by it. *New York Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591 (1886), and *Continental Bank & Trust Co. v. Maag*, 285 F.2d 558 (10th Cir. 1960), are cases in which the slayer of an insured was barred from receiving benefits under the insurance policy. *Kingsland v. Mayor*, 110 N.Y. 569, 18 N.E. 435 (1888), concerned the condemnation of a shed which had been built in violation of a statute; the court held that the value of the shed, although transferrable to a prospective buyer, was not compensable. 110 N.Y. at 582, 18 N.E. at 439. See also *Coady v. Thatcher*, 146 App. Div. 585, 131 N.Y.S. 178 (1911).

On the proposition that the government need not compensate for the taking of illegally derived property, see NICHOLS, *supra* note 8, § 12.34. On so-called "slayer's rules" generally, see H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 75-110 (temp. ed. 1958); Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936) (collecting cases).

personal effects simply because of their association with the killing of the president, this, regardless of whether this court condones, as a matter of policy, the realization of any premium attributable to such a crime. However, this peculiar interest in the property having vested in Oswald's widow, the court's function upon condemnation should be limited merely to assessing the value of the interest taken; . . .²⁶

C. *The Impact of the Police Power on Just Compensation*

The challenge of *Porter* and cases like it²⁷ lies in satisfactorily reconciling the court of appeals' concern for allocative efficiency with the district court's interest in distributional equity. Meeting this challenge requires a theory that integrates these often conflicting themes. The outlines of a principle of reconciliation are suggested by the contemporaneous existence of the power of eminent domain, which was the source of government action in *Porter*, and the police power. Whereas the power of eminent domain enables the government to compel the transfer of property from an individual to the public at a given price, the police power permits the state to confiscate or destroy the value of property without compensation when the public welfare, morals

²⁶ 473 F.2d at 1335.

²⁷ The holding of the Court of Appeals in *Porter* that the fair market value of the property taken from Mrs. Porter must include elements of value attributable to commercial demand for the items as historical curiosities places it in conflict with a holding on similar facts in the District Court for the District of Colorado, *King v. United States*, 292 F. Supp. 767 (D. Colo. 1968). In March, 1965, King purchased from Mrs. Porter her interest in the rifle used to assassinate the President and the revolver used to kill Officer J. D. Tippitt for the sum of \$10,000. In a suit to determine the amount of compensation due King subsequent to the condemnation of the weapons by the United States under the Act of November 2, 1965, P.L. 89-318, 79 Stat. 1185, the district court held that where, as here, "the property is peculiar or unique, is not an object of commerce, and has no market value," the condemnee is not entitled to produce evidence tending to establish the market value of the weapons as historical objects. 292 F. Supp. at 775. The *King* holding seems to rely implicitly on the reasoning of the Supreme Court in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), although that case is not cited in the district court's opinion. In *Kimball Laundry Co.*, the Supreme Court stated that "when the property is of a kind seldom exchanged, it has no 'market price,' and then recourse must be had to other means of ascertaining value, including value to the owner as indicative of value to other potential owners enjoying the same rights." 338 U.S. at 6. See also *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). In place of the market value of the weapons, the *King* court substituted criteria of intrinsic value, defined as the "true, inherent and essential value of a thing, not depending on accident, place or person but the same everywhere and to everyone," 292 F. Supp. at 776 (footnote omitted), and value to the owner, a subjectively determined figure not including value attributable to market demand, 292 F. Supp. at 777.

The existence of a collectors' market for items such as these, recognized by both the district court and the court of appeals in *Porter*, and its ability to establish a well-defined transferable value for these goods demonstrates the dubious applicability of the *Kimball* reasoning to these facts. Furthermore, the *King* court's somewhat arbitrary definitions of value are, at best, economically suspect. Still, the opinion is of interest to us here, for it is not unreasonable to infer that the same ethical concerns which prompted the district court's holding in *Porter* are at the root of the *King* result.

or safety so require.²⁸ As will become apparent, the state can wield this power in the public interest to discourage certain kinds of private activities and modes of acquiring property and to encourage others.

For the present, however, it need only be pointed out that the existence of the police power implies that the true value of an individual's property is affected by the real possibility that the state may choose to destroy its value without compensation. As a result, the expectations of citizens with respect to this potential destruction are of relevance in determining the true value of the property they own, a principle recognized by the Supreme Court.

A state may of course destroy or diminish values by an assertion of its police power without the necessity of making compensation for the loss. While such a change will not be presumed, the possibility or probability of such action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award.²⁹

This notion of implicit discounted value is helpful in understanding the problems raised by *Porter*. The rationale for the fair market value standard of just compensation is that payment by

²⁸ Though the term "police power" resists definition, *Berman v. Parker*, 348 U.S. 26, 32 (1954), courts have generally used it to refer to noncompensable regulations or prohibitions designed to promote public convenience or the general welfare, as well as those in the interest of public health, safety, and morals. *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 284 (1943); *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429 (1935). While the power "to protect the vital interests of the community" is reserved to the individual states, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444 (1934), it is well settled that the necessary and proper clause grants Congress power, substantially comparable to the police power, to effectuate the powers specifically granted to the United States. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Exercise of the police power is, of course, subject to limitation by specific provisions of the Constitution. *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949). See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (fourteenth amendment); *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (first amendment); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 107 (1938) (contract clause). But while the courts have successfully delineated the scope of the police power with respect to many constitutional limitations, coherent principles defining the respective contours of the police power and the takings clause of the fifth amendment have proven more elusive. For comprehensive discussion and analysis of the exercise of the police power in light of this constitutional provision, see *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 S. CT. REV. 63; *Michelman, supra* note 16; *Sax, Takings and the Police Power*, 74 YALE L.J. 36 (1964).

²⁹ *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 284 (1943). See also *United States v. Fuller*, 409 U.S. 488, 492 (1973) ("These cases go far towards establishing the general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value that . . . it might have destroyed under the exercise of governmental authority other than the power of eminent domain."); *Reichelderfer v. Quinn*, 287 U.S. 315, 323 (1932); *NICHOLS, supra* note 8, § 12.322.

In *Powelson* the Court made clear that the coexistence of the eminent domain and police powers in a given case does not of itself relieve the state of the duty to pay the possibly discounted value of the condemned property after assertion of the power of eminent domain. 319 U.S. at 284.

this standard simulates the economically efficient processes of the perfectly competitive market. This rests in turn on the assumption that the fair market value as we have defined it adequately represents the actual tradable value of the property in question. This assumption is valid only if buyers and sellers realistically account for all factors affecting the property's value. The likelihood of confiscation under the police power is one such factor and only to the extent that it is reflected in the market price of the property may the market itself be said to have fully and accurately valued the property for compensation purposes. If it is not known or understood by buyers or sellers or both, it will not be reflected in the market price, and the market may not be said to fully and accurately value the property for compensation purposes.³⁰ Although courts are not empowered to substitute their own subjective evaluation of property for the price fairly determined in the market,³¹ they may base their estimate of market value on information freely available to buyers and sellers, including the likelihood of confiscation, even though a particular buyer or seller did not possess this information or grasp its import.³²

Consider, for example, a case in which an item would, in the absence of any possibility of confiscation by the state in the exercise of the police power, have a market value of \$100. It is well known that there exists a seventy-five percent chance that the property will, in fact, be confiscated. Now suppose the state takes the property under the power of eminent domain rather than under the police power. In assessing the compensation due the owner of the property, even if the owner demonstrates that there exists a buyer who, either through ignorance of prevailing market conditions or refusal to act upon knowledge thereof, would pay \$100 for the property, the compensable value of the property would be found to be only \$25³³; the imputation of perfect information and rationality is a logical antecedent to the simulated efficiency which the compensation payment was meant to effect. Thus, what we may call the "true market value" (TMV) of a piece of property may be lower than its "fair market value" (FMV), and this difference can be attributed to the likelihood

³⁰ See O. Williamson, *Elements of a Theory of Internal Organization* 2-3 (Fels Institute Discussion Paper No. 26, University of Pennsylvania, Nov. 1972); Radner, *Competitive Equilibrium under Uncertainty*, 36 *ECONOMETRICA* 31 (1968).

³¹ *New York v. Sage*, 239 U.S. 57, 61 (1915).

³² Indeed, the notions of efficiency which motivate the payment of compensation are based on a hypothetical market situation which assumes full and perfect information on the part of traders in the market. See Arrow, *supra* note 18, at 61-62. State legislatures have recognized that imputation of market information is essential to just and rational administration of compensation law. See, e.g., PA. STAT. ANN. tit. 26, § 1-603, comment (Supp. 1973).

³³ *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 284 (1943); NICHOLS, *supra* note 8, § 12.322.

perceived by informed buyers and sellers that the state will destroy or diminish the value of the property without compensation in the exercise of the police power.³⁴ More precisely, let P be the perceived likelihood that such police power action will *not* occur, where P may take on any value between 0 and 1. Then the true market value of the property in the face of the police power is given by

$$\text{TMV} = P \times \text{FMV} + (1 - P) \times \text{APV}$$

where APV, the "after police power value," represents the market value to the owner of the interest in the property which remains after the police power action. This discounted value is an *efficient* one in that it represents the price which would be established by a perfectly competitive market characterized by perfect information.

The thrust of this argument has been that the existence of the police power implies that efficient allocation of resources may require the payment of compensation lower than the observed price a particular buyer would be willing to pay. But the concept of true market value becomes useful only when the probabilities of police power destruction of value which determine it are defined for various types of cases. Specifically, if we hope to use the concept of true market value as a vehicle for integrating the concerns of distributional equity with those of allocative efficiency, we must develop a theory of the police power which enables us to relate these probabilities to societal notions of fairness and distributive justice, and make explicit the value judgments and ethical postulates which underly that theory.

³⁴ Professor Michelman uses a similar argument to address a related but logically separable issue. Michelman, *supra* note 16, at 1237-39. He argues that the issue of *compensability* itself may turn on the degree of expectation in the individual that government action will reduce or destroy the value of his property. Thus, if the unregulated value of a property is \$100, the regulated value is \$0, and the probability of regulation is, say, .8, then *if the regulation occurs*, the owner can be said to have "lost his gamble" and should receive no compensation for the loss he has suffered as a result of the regulation. In other words, the fact that the expectation of regulation is high may be determinative of whether the regulation itself is an action in the police power or a compensable taking.

Regardless of the merit of this line of reasoning, it deals with a problem analytically distinct from that of what compensation is due for a governmental action *independently* characterized as a compensable taking. In the above example, prior to the regulatory act itself, the market value of the property in question was \$20; that is, while the "payoff" in the event the owner "loses his gamble" is \$0, the value of the "lottery ticket" represented by the property *prior* to the "playing of the game" is \$20. Thus, exercise of the eminent domain power instead of the police power does not signal a playing of the game and a determination that the owner has lost; rather, it is a taking of the lottery ticket itself, the compensable value of which is \$20. This argument reflects the notion that the owner of condemned property is theoretically to be restored in full measure for the value of the property taken, although this value may be reduced by the possibility (unfulfilled if the property is taken by eminent domain) that the property will be confiscated without compensation through the police power.

II. A UTILITARIAN CALCULUS

The formulation of a theory of the police power, in essence, entails a balancing of individual interests against societal concerns. Therefore, it would be virtually impossible to discuss this problem without having in mind some conception of social justice. For the purposes of this Comment, a utilitarian perspective has been chosen, not because that theory is a unique or even the preferred alternative,³⁵ but because much of current American social and economic policy can be traced back to utilitarian underpinnings.

A. *The Costs and Benefits of an Exercise of the Police Power vs. the Power of Eminent Domain*

In its most general terms, the utilitarian ethic³⁶ provides us with a conceptually simple algorithm for deciding whether governmental action in a given instance is warranted and, if so, whether such action is to be a compensable taking under the power of eminent domain or a noncompensable assertion of the police power. Governmental policy in this area, as in others, is to be formulated so as to maximize the aggregate social welfare. Action under the police power will be taken only if the social benefits of such action exceed the accompanying social costs; similarly, compensable condemnation of property is justified only if the social benefits of such a taking are greater than its social costs. Should the net benefits (that is, social benefits less social costs) of both police power and eminent domain actions be positive in a given situation, then the two powers may be said to exist concurrently, and the government must choose between the two. The decisional rule governing such cases is simply that the form of collective action yielding the greater net benefit is to be favored.³⁷

But merely stating the problem in these terms, of course, does not solve it. Clearly, before the broadly defined notions of social costs and benefits can begin to be of use in the creation of

³⁵ Consider, for example, the alternative offered by J. RAWLS, *A THEORY OF JUSTICE* (1971).

³⁶ It is not our purpose here to explore in depth the bases and progression of utilitarian thought. Professor Michelman's remarkably perceptive and insightful essay develops in penetrating detail the relationship between the compensability of individual harms caused by collective action and utilitarian principles. See Michelman, *supra* note 16, at 1166-83, 1208-18.

³⁷ Compare Professor Michelman's formulation of the problem: Let E be the social benefit of governmental acquisition of the property; D be the social cost incurred if no compensation is paid; and S be the social cost incurred if compensation is paid. Then the State will acquire the property if and only if E exceeds the smaller of D and S; that is, if $E > \min(D, S)$. Should this be the case, acquisition will be by eminent domain if D exceeds S, and through the police power if S exceeds D. Professor Michelman's accounting of social costs and benefits is somewhat different from ours, however. See Michelman, *supra* note 16, at 1214-15.

social policy, we must give more precise operational content to them and provide some indication as to how they might be calculated. If by these terms we mean to embrace aggregate increases and decreases in societal satisfaction and welfare rather than simply monetary measures of profit and loss, we are faced at the outset with the need to make important and difficult value judgments. Perhaps the least controversial of these is the presumption that the sole components of aggregate social welfare are the levels of personal well-being and satisfaction experienced by the individual members of society. But even this condition requires first that these personal welfare measures be roughly comparable in the sense that they may be added together to yield aggregate social welfare, and second that those individuals charged with the task of calculating social costs and benefits be able to estimate with some confidence the magnitude of changes in individual welfare levels experienced by other persons.³⁸ Moreover, we must decide on the weights to be assigned to the individual welfare levels of various persons or groups in the calculation of social welfare. While our first impulse might be to assign equal weights to all individuals, a moment's reflection will show that such a judgment might be deemed inappropriate. Should equal weight be attached to welfare benefits felt by the rich and costs sustained by the poor in the creation of policy regarding income distribution? And should we weigh equally benefits accruing to wrongdoers and costs incurred by their victims in writing the criminal law?

Let us put these issues aside for the moment to examine more closely the nature of the personal welfare costs and benefits which fall on individuals as a result of collective action. It may be helpful to picture these costs and benefits as being composed of two fairly distinct elements; a purely "economic" component and a "moral" or "distributive" component. The economic part refers to the dollar gain or loss which an individual absorbs in the wake of a given governmental action, or to other kinds of benefits or harms which are reasonably capable of translation into monetary terms. Moral costs and benefits,³⁹ on the other hand, are meant to account for the individual's feelings about the fairness or justice of the effects of collective action and to measure the

³⁸ In the shorthand of welfare economics, these are problems of interpersonal utility comparisons.

³⁹ It may, of course, be the case that moral costs and benefits, as we have defined them, depend upon the income or social status of the individual, and this poses serious problems for the utilitarian in the formulation of many kinds of social policy, particularly those areas touching significantly upon the distribution of income. Compare Hochman & Rodgers, *Pareto Optimal Redistribution*, 59 AM. ECON. REV. 542 (1969), with Musgrave, *Comment*, 60 AM. ECON. REV. 991 (1970). However, in using the concept of moral costs and benefits to help deal with the issues raised by the Porter case, we shall be considering moral effects which, to a large extent, cut across lines of income and class.

change in personal welfare he experiences due to his own ethical or moral feelings about how he or some other citizen has fared as a result of the action.⁴⁰ Although measurement of both these components is subject to the inherent uncertainty of interpersonal comparisons of changes in welfare levels it provides us with the means by which we can explicitly incorporate the concerns of distributional equity as well as those of allocative efficiency into the utilitarian calculus.⁴¹

Consider four possible ways in which an individual can be enriched. At the one extreme are situations where the individual comes by his wealth through his own efforts and talents in completely legal endeavors. These might include both cases in which the individual has produced the wealth himself and those in which he has purchased wealth legally produced by another. At the opposite pole are those situations in which an individual realizes an increase in wealth solely through his own illegal or proscribed activities. Lying between these extremes are what might be called "windfalls," cases in which an individual is enriched through no effort, act or quality of his own. We can identify in this area both "legal windfalls," increases in wealth generated by the legal and proper activities of others and passed on to the individual in question, by gift, inheritance or mere chance, and "illegal windfalls," where the wealth was generated by the proscribed activities of another and passed on to the individual.

Development of social policy towards these four modes of property acquisition requires that we examine the social costs and benefits involved in permitting the retention of property (or its equivalent in cash) acquired in each of these ways against a potential claim by the state that a greater net social benefit would accompany confiscation of the property. That is, we must ask in

⁴⁰ Thus, the concept of moral costs and benefits, which are a species of what economists refer to as consumption externalities, includes some of Professor Michelman's "demoralization costs" and some of what he terms "efficiency gains [and losses]." See Michelman, *supra* note 16, at 1214. While it is possible to stretch Professor Michelman's categories to embrace these effects, the present formulation will prove more convenient for purposes of our analysis.

⁴¹ In more mathematical terms, the problem posed at the outset of this section now looks like this:

Let ΔW_i be the change in personal welfare experienced by the i^{th} individual; n be the number of individuals in society; B_e and C_e be the benefits and costs, respectively, of the exercise of the power of eminent domain; B_p and C_p be the benefits and costs, respectively, of exercise of the police power; and let $NSB_{p,e}$ be the net social benefit of a given exercise of the police power or the power of eminent domain.

Then

$$NSB_{e,p} = B_{e,p} - C_{e,p} = \sum_{i=1}^n \alpha_i (\Delta W_i) \quad e,p$$

where α_i represents the weight attached to the welfare of the i^{th} individual in the social welfare calculation. Action in the police power is appropriate if $NSB_p > 0$, and condemnation is proper if $NSB_e > 0$. If both are positive, police power action is favored if $NSB_p > NSB_e$, and condemnation if $NSB_e > NSB_p$.

each case whether the aggregate social welfare is maximized by destruction or diminution of the value of the property to the holder in the exercise of the police power or by allowing the holder to retain the value either in the form of the property itself or in the form of compensation for condemnation by the State.

First consider the case of illegal generation; permitting retention of such wealth or its cash equivalent leads to economic benefits for the holder himself and for those who might trade with him for the property, but imposes economic costs on the remainder of society in the form of decreased material or personal security, diminished incentives to produce wealth through legal means, and increased incentives to commit illegal acts. Further, moral costs are imposed upon those who view such retention as unfair or unjust, and unless there exists considerable sympathy for the criminal in his enrichment among the members of society, the aggregate of these moral costs will very likely be quite large. The illegality of the acts which generated the wealth is *prima facie* evidence of a societal consensus that if the wealth were allowed to be kept, a net social cost would result, even if the welfare increments of criminals were not discounted.⁴² Discounting the effect of welfare benefits to the criminal and his knowing trading partners in the social welfare calculation simply increases the excess of social costs over social benefits. In view of overriding social costs, sound utilitarian policy would advise confiscation or destruction of illegally generated wealth in the exercise of the police power.

Now consider the case of legal generation. Allowing the holder of such wealth to keep it or its full cash value implies economic benefits to the holder himself and to those who would trade with him, and to the rest of society in the form of increased material and personal security and increased incentives to produce through legal means. In the absence of external diseconomies,⁴³ economic costs appear to be negligible. Moreover, the legality of the acts which led to the wealth can be taken to imply a societal judgment that such acts are productive of social welfare and hence to be encouraged. Thus the moral costs of retention (in the form, perhaps, of dissatisfaction with the legally sanctioned distribution of wealth) presumably are relatively small. In this case, then, there is a strong utilitarian presumption that holders of legally generated wealth ought to be permitted to retain it.

The windfall cases are somewhat more problematic. In the

⁴² See text following note 38 *supra*.

⁴³ That is, uncompensated economic costs imposed on others by the use of property by the holder.

case of legal windfalls, economic benefits comparable to those in the legal generation situation accrue to the holder of the wealth and his lawful trading partners, but because the holder himself has contributed nothing productive in exchange for his benefits, and thus has not "earned" them in the sense that a holder of legally generated wealth has, it is reasonable to assume that the economic benefits realized by the rest of society in the form of heightened production incentives are somewhat smaller in this case than in the legal generation case.⁴⁴ Furthermore, the absence of productive effort on the part of the holder might well generate substantial moral costs, for it may well be that many individuals who have no objection to the accumulation of wealth by those whom they perceive to have earned it do indeed see some distributive injustice in the enjoyment of wealth obtained through a fortuitous accident of birth or position. Thus, while there may be a net social benefit to allowing holders of legal windfalls to keep the value of such property, that benefit is likely to be significantly smaller than that produced by a similar policy toward holders of legally generated wealth, and in particular classes of legal windfalls, the balance of social costs and benefits associated with a policy of property retention might be very close.

Similar considerations are present in the case of illegal windfalls. Certainly the illegal act which generated the wealth imposes substantial economic costs both on the victim of the illegal act and upon the remainder of the community, but these latter costs, those of decreased security and increased incentives in the direction of criminal activity, are mitigated to some extent by the innocence or lack of complicity in the crime of the actual holder of the wealth. Moral costs of retention as well are likely to be smaller in this case than in the case of illegal generation, for many will perceive less injustice in allowing the blameless windfall beneficiary to retain such wealth than in following a similar policy toward the wrongdoer himself. Again, though there may still be a net social benefit in a policy of police power confiscation of illegal windfalls, that benefit can be expected to be smaller than that produced by a confiscatory policy aimed at the actual perpetrators of criminal activity and, as in the case of legal windfalls, there may be situations in which the balance of costs and benefits of such a policy might be quite close.

Application of these abstract principles to the facts of *Porter* is straightforward. The enhanced value of the items owned by Mrs. Porter and sought by the government clearly represent what we have termed an illegal windfall. The enormity of the

⁴⁴ It is true, of course, that plans to bestow a windfall upon another may have some incentive effects upon the potential donor.

crime which produced the wealth, the assassination of the President of the United States, and the public reaction to it suggest both the magnitude of the social costs imposed by the assassin and the absence of mitigating sympathy for his act. Moreover, it seems safe to say that Mrs. Porter herself is at best perceived as an ethically neutral figure; while most of us do not see her as carrying any responsibility whatsoever for the crime, neither do we view her as more deserving of legal or moral consideration than another similarly situated but more anonymous holder of an illegal windfall. Given these circumstances and our theoretical framework, it is not unreasonable to suggest that the social benefits of a policy of police power acquisition of these items by the government without compensation might well exceed its social costs. The significance of this conclusion for our purposes is simply that the Congress, in the realization of arguably reasonable and representative social values within a utilitarian framework, might plausibly have chosen to acquire the items taken from Mrs. Porter by assertion of the police power rather than adopting the contrary policy of permitting Mrs. Porter to retain the enhanced value of the property in the form of compensation for it.⁴⁵

B. *Likelihood That the Police Power Will Be Exercised Rather Than the Power of Eminent Domain*

In Section I it was argued that the compensation due the owner of condemned property may be smaller than the fair market value of the property if that figure does not properly account for the probability that the government, rather than choosing to condemn the property, might have elected instead to deprive the owner of its value by a valid assertion of the police power, and the last section demonstrated that, even though Public Law 89-318 provided for condemnation with compensation, a utilitarian Congress might reasonably and legitimately have seized the items or deprived Mrs. Porter of their value⁴⁶ without compensation through the police power. Thus, there remains the task of delineating precisely the relationship be-

⁴⁵ It is apparent, of course, both from the language of Public Law 89-318 and its legislative history, see 111 CONG. REC. 23,003 (1965) (remarks of Representatives Gross and Rogers), that Congress believed that condemnation of the property by eminent domain was the proper course. It is interesting to note in this connection that, in the course of congressional debate, the issue of appropriate compensation for property taken by eminent domain under these circumstances was briefly raised, and some doubt was expressed that payment of the fair market value of such items (specifically, the weapon used in the assassination, see note 27 *supra*) would constitute "just compensation." See 111 CONG. REC. 23,003-04 (1965) (remarks of Representatives Gross, Rogers, and Whitener).

⁴⁶ Congress could have deprived Mrs. Porter of their value by forbidding, for example, their transport across state lines for commercial purposes. See *Champion v. Ames*, 188 U.S. 321 (1903).

tween the existence of this plausible police power theory and the calculation of retention probabilities, and thereby the true market value of the property. Specifically, it must be shown, within useful limits, what likelihood existed at the time of the enactment of Public Law 89-318⁴⁷ that Congress, under a theory like that already advanced,⁴⁸ would provide for the noncompensable destruction of the value of the property to Mrs. Porter, rather than providing as it did, for condemnation of it.

For these purposes, assume first that, in the creation of broad social policy of the kind of concern to us here, Congress makes its decisions by a rough, and perhaps implicit, comparison of the social costs and benefits of the various alternatives open to it; that is, that Congress acts generally as a utilitarian policymaking body. Second, assume the set of value judgments and ethical postulates which formed the basis of the cost-benefit analysis of Subsection A is shared to some extent by the Congress. This assumption will hold if one accepts the suggestion that those values are to a substantial degree representative of commonly shared American social mores, and that Congress reflects the feelings of the American public.

With these assumptions in mind suppose that a bill is pending before Congress which would reduce or destroy the value of some property interest held by an individual without providing for compensation to the owner. In the course of its deliberations, Congress presumably will estimate the social costs and benefits attending the exercise of the police power in this way, and should it find that the social benefits of the measure exceed its social costs, the bill will be passed. On the other hand, were Congress to determine that the social costs of the legislation are greater than its benefits, it would either refrain from acting against the property interest at all or substitute a bill calling for condemnation of the interest with compensation under the power of eminent domain. At the same time, the public at large, and particularly those persons who are potential traders in the property interest in question, is presumed to be making similar calculations along the lines of the model of Subsection A. Based on these public appraisals of the costs and benefits of congressional assertion of the police power, we can readily identify four possible situations:

Case 1: The trading public perceives the benefits of police power action by the Congress to be very much smaller than its social costs. In this case, even if Congress were to view the

⁴⁷ We assume, for simplicity, that no information concerning the deliberations of Public Law 89-318 by Congress was available to buyers and sellers of affected goods prior to its enactment. As will become clear, our model can easily be adapted to account for the relaxation of this assumption.

⁴⁸ See text accompanying notes 36-45 *supra*.

relative magnitudes of these social costs and benefits slightly differently, and count social costs of such action to be somewhat lower than those perceived by the public while perhaps estimating the social benefits to be slightly greater, the relative excess of social costs of the proposed police power action over its benefits would still, in all likelihood, be observed by the Congress. Thus, the correspondence between the value judgments which formed the basis of the public's appraisal and those which existed in Congress need not be exact; Congress might either estimate social costs and social benefits somewhat differently than the public at large, or place slightly modified weights on the individual welfare levels of particular persons or groups in the social welfare calculation without affecting the result that social benefits of the police power action are less than the social costs. This being the case, the *a priori* judgment of the trading public would be that the likelihood of such congressional action was very small; that is, the retention probability in the face of the police power would be very close to one.

Clearly, property interests acquired in the mode which we have termed "legal generation" fall into this category. If such interests were to be taken by the government under the eminent domain power, and if it were determined in condemnation proceedings that the fair market value, as courts have used that term, did not sufficiently account for the possibility of police power action adverse to the owner of the property,⁴⁹ our theory would imply that just compensation in the form of *true* market value would essentially be identical to the fair market value.

Case 2: Quite similar considerations govern situations in which the trading public is presumed to appraise the social benefits of police power action as vastly greater than its social costs. Arguments analogous to Case 1 lead to the conclusion that the *a priori* likelihood of congressional police power legislation is very high and therefore that the retention probability is quite close to zero.

This description seems naturally to apply to property interests falling within the "illegally generated" category, and the theory indicates that if the market price of such property did not reflect adequately the potential for governmental destruction of the value of the property without compensation, the owner of such an interest would be entitled to very little in the way of compensation should the interest be condemned. This would be true even if the fair market value of the interest were substantial, because the true market value (that is, the fair market value discounted here by a retention probability close to zero) would be very small.

⁴⁹ See text accompanying notes 38-43 *supra*.

Case 3: Consider first the situation in which the relative magnitudes of the social costs and benefits of police power action by the Congress are much closer to one another than in the two previous cases, but in which the trading public, on the strength of a cost-benefit analysis like that of Subsection A, is presumed to perceive the social costs of such action as greater than its benefits. While the public's *a priori* judgment would thus be that such police power legislation is unlikely, the question is more difficult than in Case 1. This is because a small deviation by Congress from the value judgments underlying the public's cost-benefit calculation could tip the balance between perceived costs and benefits and lead Congress to pass the police power legislation in the belief that the social benefits of the action outweighed its social costs; this deviation could easily grow either from a small "error" on the part of Congress in assessing social costs or from a slight difference between the ethical judgments presumed by the legislators and the trading public. The relatively small difference between publicly perceived social costs and benefits arising out of the potential exercise of the police power points to an inherent uncertainty not present in our earlier cases. Thus, while the retention probability is high (that is, greater than one-half) due to the public's presumed judgment that the social costs of police power action outweigh the social benefits of such legislation, there exists a significant possibility that Congress will see the matter differently, and so the retention probability is substantially less than one.

Situations such as this might well arise when the property interest involved is what we have portrayed as a "legal windfall." Recall that in such cases, the social costs of police power action were arguably lower than in legal generation cases, and the attendant social benefits were arguably greater. The relevant probability of retention would therefore be lower, although exactly how much lower would depend on the circumstances of a given case. An owner of property interests classified as legal windfalls might thus expect substantial compensation for them in condemnation proceedings, but this reimbursement will in general be smaller than it would have been had the interests been legally generated.

Case 4: We come, finally, to instances in which the difference between the perceived social costs and benefits associated with police power legislation by the Congress is once again relatively small, but in which the trading public is held to regard the social benefits of such action as greater than the corresponding social costs; a case in this group could well concern wealth generated by an "illegal windfall." Arguing analogously to Case 3, we can conclude that because there exists a significant

likelihood that Congress will estimate the costs and benefits involved so as to contradict the judgment of the trading public, the probability of retention in the face of the police power, although less than one-half, is substantially greater than zero. As before, the facts of each case will determine the precise value of the retention probability relevant to the case, but owners of illegal windfall interests will generally find that compensation in the wake of condemnation of those interests, while not negligible, will be much smaller than the fair market value (presuming that value not to have previously accounted for the possibility of police power action) of the property.

A rather clear set of relationships appears between the various classes of property interests we have identified and the probabilities that such interests will not be taken or destroyed without compensation by the government in the assertion of the police power. It may be summarized as follows:

<i>Mode of Property Acquisition</i>	<i>Retention Probability</i>
1. Illegal generation by holder	Very close to zero;
2. Illegal windfall to holder	Greater than zero, but less than $\frac{1}{2}$;
3. Legal windfall to holder	Greater than $\frac{1}{2}$, but less than one;
4. Legal generation by holder	Very close to one.

Under this analysis, fixing compensation for Mrs. Porter's condemned illegal windfalls in a way which satisfactorily melds considerations of economic efficiency with concerns of distributional equity becomes a much more tractable problem. If it can be shown that the fair market value of the items already includes a devaluation due to the market's perception of the likelihood of a destructive exercise of the police power, then that value represents the true market value and as such, is the appropriate measure of compensation. If, on the other hand, the fair market value does not account for the possibility of police power action, then it must be discounted by a retention probability derived along the lines already suggested. If, in fact, the fair market value has not been so discounted and if it is assumed that the "after police power value" of the *Porter* property is negligible, then the district court's award of \$3,000 to Mrs. Porter corresponds to an imputed retention probability of approximately .17, a result which, while perhaps somewhat harsh, is certainly well within the range of values anticipated by the theory discussed here. Thus, our analysis provides a rationale for the result

reached by the district court and permits the avoidance of the seemingly logical but ethically disturbing decision of the court of appeals.

III. CONCLUSION

It is not suggested that either court was or should have been aware of the theory elaborated here. But perhaps the better test of a legal principle is not whether it can rationalize a past result but whether it can be used in deciding future cases. Practical application of the model suggested here is not without its problems. The calculation of precise retention probabilities may in some cases be impossible or prohibitively costly simply because the courts have only a limited capacity to obtain and interpret information essential to such calculations.⁵⁰ The courts' limited ability to gain and assess information means that in many cases—primarily those dealing with windfalls—the analysis suggested here will result not in a single value but in a range of values within which compensation must be paid.

This is not an especially disturbing result; once the proper range is found, the judicial process is particularly well suited to "fine-tuning" decisions according to the circumstances of each particular case. The gauging of shifting social values is probably the area of the jury's greatest competence. With the guidance of a judge who by training and experience is expert in making the subtle distinctions that distinguish close cases, a jury should find the task of fixing compensation challenging but not impossible.⁵¹

Thus, in the final analysis, the contribution of this model may not be in the ultimate fixing of compensation, but in a narrowing of the range of the courts' discretion. Such a narrowing will certainly have social benefits, for if traders in the market are able to rely upon principled, consistent judicial valuation of property, fear of unreasonable deprivations will diminish and willingness to initiate potentially beneficial transactions will increase.

⁵⁰ This condition is referred to as "bounded rationality." See Williamson, *supra* note 30, at 2.

⁵¹ Thus, the facts of the *King* case, discussed note 27 *supra*, might generate a retention probability different from that in *Porter*.